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Nos. 94-558 and 94-627

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In The

Supreme Court of the United States

October Term, 1994

UNITED STATES,

Appellant,

v.

RAY HAYS, *et al.*,

Appellees.

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, individual liberty, and the free exchange of ideas. The instant case involves the power of the state to make decisions on the basis of racial classifications.

Although the question in the case before this Court concerns the constitutional legitimacy of race-based congressional districting, the issues presented involve both the legal standards contained in the Voting Rights Act and fundamental questions about American society, its openness to racial change, and the nature of democratic representation.

This brief was prepared with the assistance of Professor Abigail Thernstrom, one of the nation's foremost experts on the history and jurisprudence of the Voting Rights Act.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

CONDENSED STATEMENT OF FACTS

The complete statement of facts and the history of this litigation has already been presented by both parties. This brief summary is designed to highlight those facts we believe are critical to the proper understanding and disposition of the case. A congressional districting plan adopted by the state of Louisiana following the 1990 census contained seven districts, two of which were majority-black. One of those two (District 2) was unremarkable; it differed little from that which it replaced. The contours of District 4, however, were new. The district was drawn with the explicit purpose of creating a

second safe black constituency, and was thus subsequently successfully challenged as an unconstitutional racial gerrymander – an impermissible racial classification. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded on other grounds*, 114 S.Ct. 2731 (1994) (U.S. Jurisdictional Statement ("J.S.") App. 39a).

Louisiana redrew the lines, but the new district, which split parishes and cities, was again extremely irregular in shape, and direct trial evidence suggested that its contours were again determined by racial considerations. The plan was defended by Louisiana as reasonable, resting on traditional districting criteria, race-conscious but not race-driven. On the other hand, the state asserted, even if viewed as a racial classification, subject to strict scrutiny, it could meet the test; it was narrowly tailored to remedy past discrimination and to further a compelling state interest in complying with the Voting Rights Act. These are the main arguments, rejected by the court below, see *Hays v. State of Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (U.S. J.S. App. 1a), that Lousiana now reiterates on appeal.

SUMMARY OF ARGUMENT

We take as our starting point that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 290-91 (1978) (opinion of Powell, J.). Under this Court's jurisprudence, any use of racial classifications must be narrowly tailored to a compelling governmental purpose. *Shaw v. Reno*, 113 S.Ct. 2816, 2825 (1993).

The principal governmental purpose asserted by appellants is compliance with the Voting Rights Act. We offer this brief mainly to address the vital and dispositive

issue of whether the Voting Rights Act requires the drawing of a maximum possible number of majority-minority districts. The act was designed to ensure access to the ballot and an equal opportunity for electoral representation. It does not require racial gerrymandering to promote the proportional representation of racial groups. In fact, such efforts are themselves destructive of our nation's social fabric and contrary to the ideals embodied in our civil rights laws. For all these reasons, racial proportionality as the end to which government action is directed, far from representing a compelling interest, is both misguided and impermissible.

ARGUMENT

I. THE VOTING RIGHTS ACT DOES NOT REQUIRE THAT LOUISIANA DRAW TWO MAJORITY-BLACK DISTRICTS. THEREFORE THE NEED TO COMPLY WITH THE STATUTE DOES NOT CONSTITUTE A COMPELLING STATE INTEREST JUSTIFYING THE RACIAL CLASSIFICATION IN THIS CASE.

Constitutional and statutory questions are intertwined in this case; the two cannot be separated. Appellees argue that the race-conscious districting in which Louisiana engaged constitutes a racial classification in violation of plaintiffs' equal protection rights. Appellants reply that if District 4 is indeed a racial classification, the state's decision meets the test of strict scrutiny; the lines were drawn to further a compelling state interest in complying with Sections 5 and 2 of the Voting Rights Act.

Two questions are thus before this Court: What does the Fourteenth Amendment allow, and what does the Voting Rights Act require? If the congressional district lines were drawn on the basis of racial classification, this

Court cannot resolve the Fourteenth Amendment question without deciding what the Voting Rights Act requires. Louisiana has no compelling interest in complying with erroneously interpreted law.

A. District 4 is clearly a racial classification; the segregation of black voters is its point.

"After reviewing the evidence, we find that Act 1 [creating District 4] can only be explained credibly as the product of race-conscious decisionmaking," the district court concluded (U.S. J.S. App. 4a). Essentially uncontroverted direct trial evidence established the existence of a racial classification (U.S. J.S. App. 51a).

A racial classification is an action in which race is a factor in the decision-making process. See *Arlington Hts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The Congressional Black Caucus, in its brief, calls Lousiana's District 4 and majority-black districts in general "among the *least* segregated districts in the Nation." Brief for the Congressional Black Caucus as Amicus Curiae at 19-20. Such "minority-majority" districts are indeed not racially "segregated," if by that we mean districts whose populations are exclusively of one race. They are racially mixed, and contain substantial numbers of whites.

But integrated they are not, by any sensible definition. White voters are merely "filler" in such districts, as two proponents of racial gerrymandering have acknowledged. Aleinikoff and Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 *Mich. L. Rev.* 588, 630-31 (1993). They are included so as not to waste black ballots by excessive "packing."[1]

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[1] Whites in majority-black districts, the authors write, "should not be expected to compete in any genuine sense for

In these districts only the black ballots are meant to count. These districts are reserved for black candidates. In effect, they have a sign pasted on them: no white candidates need apply. Indeed, in 1992 several members of the U.S. House of Representatives chose to retire or move to other districts under pressure from black leaders to let blacks run racially uncontested races in newly created black majority districts. Lublin, "Gerrymander for Justice? Racial Redistricting and Black and Latino Representation," 48, 90 (1994) (unpublished manuscript). It is hardly a coincidence that the present occupant of the congressional seat from District 4 was the chairman of the Louisiana State Senate reapportionment committee that drew its convoluted boundaries. *Congressional Quarterly's Politics in America, 1994: The 103rd Congress* 650 (Duncan, ed., 1993). The district he mapped out was designed as a safe black seat.

There should be no dispute that District 4 and other majority-black constituencies constitute a racial classification. Not because they look bizarre, but because the classification of voters by race is precisely their point. Race has determined their contours. They are intentionally race-based – for a goal their proponents believe in: maximizing black officeholding. This means that race surely has been a consideration in their creation. And under this Court's case law, that is sufficient to establish the existence of a racial classification. See, e.g., *Arlington Hts., supra.*

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electoral representation" in those districts, "lest they undo the preference given to the specified minority group." *Id.* at 631.

B. District 4 was not a racial classification demanded by the law. The Voting Rights Act does not require states to maximize black officeholding by means of race-based districting.

Neither Section 5 nor Section 2 of the Voting Rights Act required the drawing of a second majority-black congressional district in Louisiana. The Department of Justice misconstrues the law. The state has a strong interest in complying with the law, but only as validly interpreted and applied. See *Shaw v. Reno*, 113 S.Ct. at 2830 (states have an interest in complying with laws that are "constitutionally valid as interpreted and as applied").

1. Section 5 protects against districting plans that are discriminatory in either effect or purpose. A plan with one majority-black district would have met the effects test for retrogression.

In *Shaw v. Reno*, 113 S.Ct. at 2831, this Court referred to the possibility that the state of North Carolina "went beyond what was reasonably necessary to avoid retrogression" – the discriminatory effect against which Section 5 guards. But in fact, it was not the state that was out of bounds; it was the U.S. Department of Justice, which directed North Carolina to create a second majority-black district. In this case, too, the Attorney General made sure the state understood its alleged obligation to draw two safe black districts. See, e.g., Jt. App. 229 (letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Brenda Wright and Robert B. McDuff, dated April 20, 1994). In sending that signal, the Department far exceeded its statutory authority.

Some history may be useful here.[2] At the outset, the effects test contained in Section 5, the preclearance provision, was nothing more than a corollary of Section 4, which banned literacy tests in states and counties with a bad record on black enfranchisement.[3] The point of Section 5 was to make sure that the effect of that ban stuck. The demand that federal authorities preclear any new voting procedure in counties and states in which literacy tests had been suspended had an unambiguous and limited aim: guarding against renewed disfranchisement, the use of the back door once the front one was blocked.

The ingenuity of racists had kept voting rights litigators always running and always behind, and those who shaped the Voting Rights Act could not be sure that eliminating the literacy test would do the trick. As the distinguished civil rights attorney Joseph Rauh explained, the preclearance provision was included "to stop ways around . . . voting legislation . . . simply [as] self-defense." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 399 (1965).

In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), a broader view of the provision emerged – one that allowed the Justice Department to review annexations, new district lines, and other changes affecting minority voting

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[2] For a full account of the history of the Voting Rights Act, including the record of judicial and administrative enforcement, see Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987).

[3] Jurisdictions subject to the ban were identified by a statistical test. States and counties in which total registration or turnout in the presidential election of 1964 had fallen below 50 percent and a literacy test had been used to screen potential registrants were assumed to have engaged in electoral discrimination. Thernstrom, *id.*, at 16-17.

strength. But this Court never abandoned the "self-defense" rationale. The point of Section 5 remained protection from backsliding – from "retrogression." It was to protect gains already in place – to stop measures that left blacks worse off, deprived of electoral power they already had. See *Beer v. United States*, 425 U.S. 130 (1976); *City of Lockhart v. United States*, 460 U.S. 125 (1983).

If there had been two majority-black congressional districts in Louisiana prior to the 1990 census, the state could not have chosen to eliminate one. But if the state had only one – as was the case – it was not legally obligated, under the effects test in Section 5, to create another. As this Court stated in *Beer*, 425 U.S. at 141, "It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of section 5."

Louisiana did not misread Department of Justice signals, but those signals were not grounded in the law. The Department ignores the clear meaning of the statute and this Court's decisions interpreting the act.[4] The state had no compelling interest in complying with unwarranted federal demands.

2. The standard by which the Justice Department judges the question of discriminatory purpose under Section 5 is also legally unjustified.

In its correspondence with Louisiana over an earlier districting plan for the state board of education, the

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[4] Justice White in *Shaw*, 113 S.Ct. at 2838 (White, J., dissenting), states that the "Attorney General's interposition of a § 5 objection 'properly is viewed' as 'an administrative finding of discrimination'." But that finding rested on standards that this Court never has sanctioned.

Department of Justice acknowledged that the proposed lines "appear[ed] to have no retrogressive effect" and thus in large measure met the Section 5 requirement. But it refused to preclear the plan because an allegedly better one could be drawn. See U.S. J.S. App. 55a n.21. That "better" one contained a second, bizarrely-shaped majority-black district; and the failure to draw that district, the Justice Department concluded, was a sin of omission that betrayed discriminatory intent.

The state thus assumed that the Justice Department would insist that a congressional districting plan also contain a maximum number of majority-black constituencies. But the demand was indefensible. It is an interpretation of Section 5 that makes the question of discriminatory effect – to which the provision explicitly refers – superfluous; a finding of racist intent now arises to condemn every electoral plan with an allegedly insufficient number of safe black single-member districts. And it is a view that gives any organization that comes forward with a "preferable" districting scheme – one that seems to ensure more black officeholding – the potential power to veto arrangements negotiated in good faith by elected policymakers.

In short, while Louisiana was doubtless convinced that the Attorney General would insist on a second safe black congressional district, the state had no compelling interest in complying with unwarranted federal demands, an erroneously interpreted law. To hold otherwise would allow federal officials, whose wide-ranging discretion is not subject to review, to implement legal standards at odds with the statute they are charged with enforcing. Further, it is a view of discriminatory purpose at odds

with this Court's decisions. See, e.g., *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).[5]

C. Section 2 is irrelevant to preclearance, and, in any case, guarantees only equal electoral access, not "racially fair" outcomes.

1. Sections 5 and 2 of the Voting Rights Act are distinct provisions; preclearance should never depend on meeting Section 2 standards.

The Justice Department led Louisiana to believe that compliance with Section 5 involved meeting the legal standard contained in Section 2 as well. The two provisions, however, are entirely separate; they "differ in structure, purpose, and application," this Court noted in *Holder v. Hall*, 114 S.Ct. 2581, 2587 (1994). As the District Court for the District of Columbia recently explained at length in two important decisions, Section 2 cannot be viewed as part of the preclearance provision; the one was never "incorporated" into the other. *State of New York v. United States, supra; Georgia v. Reno, supra.* The Department's guidelines erroneously state otherwise.[6]

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[5] Two federal district court decisions recently have condemned Justice Department administration of section 5, and specifically its approach to discriminatory purpose as contrary to law. See *State of New York v. United States*, No. 94-2219, U.S. Dist. LEXIS 19345 (D.D.C. Dec. 22, 1994); *Georgia v. Reno*, No. 90-2065, 1995 U.S. Dist. LEXIS 1421 (D.D.C. Feb. 3, 1995).

[6] Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.55 (b)(2) (1994): "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation

In 1982, when Section 2 was transformed from an inconsequential preamble into a powerful instrument for ridding the nation of methods of election with a discriminatory "result," there was literally no discussion of changing Section 5. In fact, during the debates of 1981 and 1982, civil rights spokesmen directly and indirectly assured members of Congress that the amendment of Section 2 would not alter the preclearance provision. See, e.g., 128 Cong. Rec. 14,938 (1982) (exchange between Reps. Don Edwards and Elliott H. Levitas). Nevertheless, the Justice Department unilaterally changed the legal standards by which Section 5 is enforced, evidently on the assumption that Congress had acted without debate to drastically alter a clearly defined provision in the act. In justifying such a radical overhaul of a key provision – one whose limits were well-understood – the Department can point only to one footnote, buried in the 1982 Senate Judiciary Committee Report and unsupported by the text to which it was appended.[7]

Louisiana cannot justify the race-based contours of District 4 by alleging a compelling state interest in meeting a Section 2 standard. Those standards are irrelevant to the preclearance process, as well they should be. The subtleties of a Section 2 inquiry into complex questions of electoral opportunity demand a judicial proceeding; the process of administrative review does not suffice. The difficult factual issues of a Section 2 lawsuit, described

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of amended section 2, the Attorney General shall withhold section 5 preclearance."

[7] That footnote states that "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (hereinafter "1982 Senate report").

below, cannot be adequately addressed in a summary administrative procedure.

2. Compliance with Section 2 would not in any case necessitate the drawing of two majority-black districts. The provision guarantees equal electoral access, not "racially fair" outcomes.

Section 2 guarantees equal electoral access, not "racially fair" outcomes. It is "standard remedial legislation." Butler, "Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?," 26 *Rutgers L. J.* (forthcoming 1995).[8] Before African American voters are entitled to the creation of even one safe black constituency, plaintiffs must establish a violation of their statutory right to an electoral process open to black political aspirations.

As amended in 1982, Section 2 demands that redistricting plans (and other electoral arrangements) provide minority voters with an equal opportunity to participate in the political process and to elect representatives of their choice.

But when do minority and white voters stand on "equal" electoral footing, so that a particular districting scheme can be said to be "fair"? The answer has never been crystal clear. In 1982 Congress lifted the Section 2 language directly from two constitutional decisions. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973), this Court directed trial courts to

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[8] As Butler points out, "A jurisdiction that adopts extreme measures [stringing together black residential pockets] to create majority-black districts is akin to a manufacturer paying punitive damages to potential purchasers of its product prior to anyone suffering an injury or establishing a defect in the product." *Id.*

assess the electoral environment – the setting in which the voting took place. Judges had thus been asked to distinguish the failure of minority voters to elect candidates of their choice for reasons of race from normal electoral defeat – that to which every group, however defined, is vulnerable. It had been, however, a very tall order. What were the criteria that distinguished the one setting from the other?

It was not clear and it could not be. Unequal electoral opportunity was an elusive concept. Did black and white Democratic Party voters stand on the same electoral footing when the candidates of their choice were regularly defeated in a Republican county? Or were blacks distinctively entitled to some degree of representation? As Justice Frankfurter observed, we can only know if voters are improperly represented if we know what it means to be properly represented. *Baker v. Carr*, 369 U.S. 186, 299-302 (1962) (Frankfurter, J., dissenting). And yet we lack a theoretical framework to decide. The point still holds 23 years later.

Nevertheless, if Section 2 required courts to measure an inadequately defined phenomenon – electoral inequality – it did not leave judges entirely clueless. Some guidance was provided. In *Whitcomb, supra,* this Court unequivocally rejected the view that a showing of disproportionately low minority officeholding and evidence of black residential clustering would suffice to establish electoral discrimination. By lifting language directly from *Whitcomb* and from *White, supra,* Congress thus rejected the notion that black voters were entitled to legislative seats reserved for black representatives. Minority voters were guaranteed not their "fair share" of political offices, but only a "fair shake" – a chance to play the electoral

game by fair rules.[9] In fact, the language of section 2 – guaranteeing minority voters an equal opportunity "to elect representatives of their choice" – plainly suggested a definition of representation broader than that which would have been conveyed had the phrase read "*minority* representatives of their choice."

In addition, the concern clearly was with election contests in racist settings. Black voters, Congress concluded, lacked an equal chance to elect representatives of their choice where race had left them politically isolated – without potential allies in electoral contests. That focus was spelled out by numerous witnesses at the 1982 hearings and in the Senate Judiciary Committee Report as well.

Thus, the Report listed "factors" to which courts were instructed to refer in judging the merits of a vote dilution suit. They included a history of discrimination, racial polarization, a candidate slating process to which minorities were denied access, political campaigns characterized by racial appeals, and a lack of responsiveness on the part of public officials to minority interests. 1982 Senate Report at 28-29; Thernstrom at 192-197. The point of the list was clear: to help judges identify those situations in which either a history of discrimination or ongoing racism had left minority voters at a distinctive disadvantage in the electoral process. Not only the list, but other language in the Report signalled the importance of past and present racism. The concern, the report noted, was with those exceptional communities in which racial

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[9] The "fair share," "fair shake" distinction is taken from Blumstein, "Defining Discrimination: Intent vs. Impact," *New Perspectives* (Summer 1984), at 29, 30. See also Abram, "Affirmative Action: Fair Shakers and Social Engineers," 99 *Harv. L. Rev.* 1312 (1986).

politics still dominated the electoral process. 1982 Senate report at 32.[10]

That was the message as well of a number of civil rights advocates who testified at the 1982 hearings. For instance, Armand Derfner, a leading civil rights attorney and key witness, argued that single-member districts had "no precisely correct racial mix." The entitlement was not to districts that were, say, two-thirds black. Section 2 only promised an electoral process that was fluid – open to racial change – not "frozen." Courts were expected to ask if minority voters would have "some influence." *Voting Rights Act: Hearings on S. 1992 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 803 (1982) (testimony of Armand Derfner). Claims of dilution would rest, Derfner said, on "evidence that voters of a racial minority [were] isolated within a political system . . . 'shut out,' i.e. denied access . . . [without] the opportunity to participate in the electoral system." *Id.* at 810 (prepared statement of Armand Derfner).

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[10] The 1982 Senate report also cited *McCain v. Lybrand*, No. 74-281, slip op. (D.S.C. Apr. 17, 1980), as an illustration of the faithful application of the already familiar "results" test. The plaintiffs had prevailed in that decision because black candidates, the court found, tended to lose elections "not on the merits but solely because of their race." A report issued by the Subcommittee on the Constitution of the Senate Judiciary Committee had expressed concern that this distinction would be lost. Not so, declared the full committee's report. In "most" jurisdictions, white voters give substantial support to black candidates. But "unfortunately . . . there are still some communities . . . where racial politics do dominate the electoral process." And in such communities "a particular election method can deny minority voters equal opportunities to participate meaningfully in elections." 1982 Senate Report at 33.

No witness, however, offered a definition of that total electoral exclusion against which the act protected, except to say that the test had been met when a group had "really been unfairly throttled." *Id.* at 803. "Unfairly throttled," that is, by racism, the entire history of the act made clear.

Some will argue that an interpretation of Section 2 that makes racist exclusion the test of electoral discrimination is at odds with the stated aim of those who amended the statute in 1982. Not at all. The objection in 1982 to the decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), was to the demand that plaintiffs produce a "smoking gun." Advocates did not object, in other words, to the focus on racism, but only to this Court's alleged insistence on direct evidence of racist intent.

In sum, in revising Section 2 Congress unequivocally and properly rejected the notion of group entitlement to even one legislative seat – however concentrated or dispersed black residential patterns were found to be. Had witnesses at the 1982 congressional hearings lobbied for an amended statute that would encourage race-based districting and thus guarantee legislative seats for members of designated minority groups, their arguments certainly would have fallen on deaf ears. Such a demand was not even remotely politically possible.

Section 2 did not necessitate the drawing of Louisiana's District 4 – Justice Department demands to the contrary notwithstanding. Louisiana may have drawn a second majority-black district in order to avoid costly and disruptive litigation. Redistricting is a politically complex and laborious process, and to present a plan that is rejected is a waste of extensive political effort. That the state sought to avoid rejection is understandable, but it is not a compelling state interest that justifies a racial classification.

D. This case is not aberrational. The Justice Department's reading of the Voting Rights Act has long been at odds with the statute, and its extra-legal role in the preclearance process should be examined by this Court.

The voting rights section of the Justice Department's Civil Rights Division has assumed freewheeling power to object to districting plans that did not seem "right" – racially "fair" – since at least 1980.[11] In 1981, for instance, a Justice Department memo on county council districts for Barbour County, Alabama, explained that calculating what was "fair" was simple. "Since blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts [that is, two viable districts plus a third influence district]." The voting rights section itself drew up the "right" plan. Such calculations had become a routine part of the preclearance process. Thernstrom at 171-72. More recently, with the availability of sophisticated computer software, those calculations have become much more fine-tuned.

Under section 5, the voting rights section acts in a quasi-judicial role. The legal standards it uses to enforce section 5 should track those that this Court has developed. In practice, however, maximization has become the test of racial fairness by which the Justice Department routinely judges districting plans.[12] The New Orleans

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[11] This criticism is developed in detail in Thernstrom, chapter 8; and in Butler, "Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?" 56 *Univ. of Colo. L. Rev.* 21 (1984).

[12] During the Bush administration, the obligation to draw a maximum number of majority-minority districts became no secret. The assistant attorney general for civil rights regularly insisted that minority voters were entitled to their "fair share" of political power. (See, e.g., Mr. Dunne's speech to the American Bar Association, Atlanta, Georgia, August 10, 1991, cited in

plan approved in *Beer* would not now pass administrative review; what this Court precleared, the Justice Department will not. When the Department does acknowledge the retrogression standard, as in this case, it imports into section 5 a definition of discriminatory purpose also unsustained by the law. *State of New York v. United States, supra; Georgia v. Reno, supra.*

Both the court below and the district court in *Johnson v. Miller*, 864 F.Supp. 1354 (S.D. Ga. 1994), *prob. juris. noted*, 115 S.Ct. 713 (Jan. 6., 1995) (No. 94-631), raised serious concerns over the Justice Department's coercive role in bending local jurisdictions to its wishes. See, e.g., U.S. J.S. App. 53a-57a n.21. The circumstances were particularly egregious in the Georgia case, where Justice Department lawyers who have the responsibility to make impartial preclearance determinations worked in active concert with outside groups who wanted race-conscious districts. The state of Georgia, the district court found, was forced by the Justice Department to accept the American Civil Liberties Union's "max-black plan." *Johnson*, 864 F. Supp. at 1360-63. The ACLU's attorney, Ms. Kathleen Wilde, developed a relationship with the voting rights section that was "informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 1362.

It is of vital importance that this Court once again give clear guidance as to the legal standards contained in

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Thernstrom, "*Shaw v. Reno*: Notes from a Political Thicket," *1994 Public Interest L. Rev.* 39. There is literally no disagreement, across the political spectrum, that the Justice Department has construed the Act to require the creation of majority-black single-member districts wherever possible. Indeed, the question has now become the limits, wisdom, and application of that strategy. See, e.g., Guinier, *The Tyranny of the Majority* (1994).

Sections 5 and 2; without such guidance, the Justice Department has *carte blanche* discretion to insist that jurisdictions follow its dictates or come to Washington to defend their actions. The Voting Rights Act fundamentally altered traditional federal-state relations. Federal intrusion into constitutionally sanctioned local prerogatives is all the greater when the legal parameters are unclear and decisions are made on the basis of unbounded administrative whim.

II. THIS COURT'S RESOLUTION OF THESE NARROW STATUTORY ISSUES WILL HAVE PROFOUND CONSEQUENCES FOR OUR FUTURE AS A MULTIRACIAL, MULTIETHNIC SOCIETY.

District 4 is a racial classification for familiar affirmative action ends.[13] The point of Louisiana's race-conscious districting was precisely that of most affirmative action policies: to provide maximum protection for blacks from white competition. Law school affirmative action programs, by setting separate admissions standards, pit black applicants primarily (sometimes only) against other blacks. Likewise, "safe" black legislative districts amount to protective racial sorting. Their object is to ensure electoral contests in which black candidates compete only against other black candidates, eliminating potential white competitors.

Questions involving affirmative action in the electoral sphere are not simply about who ends up in which district. They go to the very heart of how we see ourselves as a multiracial, multiethnic nation. At issue between the opposing sides in this case are quite different views of American society, the place of minorities in it,

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[13] By "affirmative action," we mean race-conscious action to secure equal outcomes for certain designated groups.

the society's openness to change, the nature of democratic representation, and the costs of race-conscious policies. This Court's decision will shape our future in far-reaching ways.

A. Affirmative action policies are unnecessary and quite possibly counterproductive in the electoral sphere.

1. The premise that blacks can get elected in majority-white settings only very rarely and under exceptional circumstances is not supported by the evidence. Black officeholding does not depend upon majority-black constituencies; whites frequently vote for black candidates.

Black candidates cannot get elected in majority-white settings, the brief for the Congressional Black Caucus argues. That is "contemporary reality." Brief for the Congressional Black Caucus at 1. The doors of political opportunity are still closed. Black candidates remain at the mercy of racist white opposition. Hence the need for protective policies – for race-based districts drawn to ensure black officeholding, which was an implicit statutory promise.

This assessment of the American racial landscape is not only bleak, but wrong. The evidence is not sufficient to support the assertion. And if it was, it would not justify drawing race-based districts. Plaintiffs cannot prove a section 2 violation simply by pointing to disproportionately low minority officeholding.

Whites not only say they will vote for black candidates; they do so, often casting their ballots for an African American running against a white opponent. That choice is most often available in mayoral contests. Conventional wisdom has it that the overwhelming majority of black mayors have been elected from majority-black cities. This

is true but misleading. Most of those black "cities" are in fact tiny majority-black towns in the South. Eliminate those small urban dots on the southern map, focus on cities of 50,000 or more in population, and quite a different picture emerges. Eighty-three percent of the black mayors elected in such cities over the last thirty years have not had the benefit of a majority-black constituency. Sixty-one percent were elected in municipalities less than 40 percent black, and 43 percent took office in cities less than 30 percent African American.[14]

It is not only in races for a mayor's seat that white voters choose black candidates over those who are white. L. Douglas Wilder, in his successful gubernatorial run in 1989, received an estimated 40 to 43 percent of Virginia's white vote. Skeptics will say that figure still represents only a minority of the white electorate, but Charles Robb, the white Democratic governor who preceded Wilder, did only a shade better – 45 percent. Illinois (11.6 percent black) elected Carol Moseley-Braun as its U.S. Senator in 1992. In 1994, Ohio elected J. Kenneth Blackwell as state treasurer and New York chose H. Carl McCall as state comptroller. Also in 1994, J.C. Watts won a congressional seat in an 83 percent white Oklahoma district. This is not a new phenomenon. Andrew Young was elected to Congress in 1972 from Georgia's fifth district, which was then majority-white.

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[14] The data are contained in Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn eds. 1995).

2. There is no evidence in this case that African American candidates cannot get elected from majority-white districts in Louisiana.

Much is made in the brief for the Congressional Black Caucus of the fact that no black member of Congress from a majority-white constituency has been elected in Louisiana. Hence the need for safe black constituencies. In fact, for three reasons that record is not particularly telling.

One, the past is not the future. White racial attitudes have been changing fast, and the record of black electoral success in 1975 tells us little about the prospects for such success in 1995.

Two, black candidates cannot win contests they do not enter. And scholars who attempt to assess white willingness to support black candidacies on the basis of election returns cannot learn anything from Louisiana elections in which no black candidate has been in the race.

Three, congressional candidates – whatever their color – cannot win elections if their political views are at odds with the majority of voters in their district. California Rep. Ronald V. Dellums gets elected from a constituency that includes Berkeley and like-minded suburbs, but few majority-white districts are as left-leaning as his. Particularly in the South, centrist and conservative candidates (whether white or black) will do better than those who are militantly liberal. J.C. Watts, a conservative black Republican, likely would not have been elected in Oklahoma had he run as a liberal Democrat.

Some argue that centrist or conservative black candidates who can attract strong white support are not "authentically" black. See, e.g., Guinier at 55-58. Apart from the demeaning perception that individual blacks share a common and distinct perspective, this view is

contradicted by polling data, which find African Americans divided on many issues. See, e.g., Bolick, "Blacks and Whites on Common Ground," *Wall St. J.*, Aug. 5, 1992, at A14. Indeed, many of the nation's recently elected black mayors are fiscal conservatives, tough on crime, and opposed to busing.

In any case, the Voting Rights Act is ideology-blind. There is no legal basis for holding that blacks who run as moderates or conservatives are no longer "black" in terms of "counting" for purposes of representation.

3. The Voting Rights Act is a statute to protect black voters, not officeholders. Race-based districting does not necessarily protect black voters.

All elected officials – including, of course, members of the Congressional Black Caucus – like safe constituencies from which to run. District 4 is a safe constituency. Majority-black districts almost inevitably elect black legislators; black voters (unlike those who are white) tend to vote as a bloc – a consequence of the relative novelty of their electoral power.

Safe black districts are a gift to black politicians. But they are not necessarily in the interest of black voters or in the public interest. As Blumstein notes, determining whether majority-minority districts are advantageous to black voters involves subtle issues. Blumstein, "Racial Gerrymandering and Vote Dilution – *Shaw v. Reno* in Doctrinal Context," 26 *Rutgers L. J.* (forthcoming 1995). Such districts frequently may marginalize the black elected officials upon whom the voters count to represent their interests effectively. Politics is the great melting pot; elected officials who ignore constituents do so at their peril. A greater dispersion of black voters over more

"influence districts" may often result in better representation of black voters, since more public officials, both black and white, will owe their election in part to black support. Moreover, draining majority-white districts of black voters means fewer opportunities for black candidates: the "floor" for representation ultimately creates a ceiling.

4. Affirmative action policies must be temporary, and subject to modification or curtailment when their remedial objectives are accomplished. But once created, racially-gerrymandered districts will be far more difficult to root out.

Legislative districts that protect black candidates from white competition serve an affirmative action purpose. They are analogous to separate lists for black and white candidates for spots on a police force or seats in a medical school class. They differ, however, in a crucial respect. Preferential admissions and hiring policies are, in theory, temporary; their life will end, proponents argue, when such protective racial sorting is no longer necessary. That is not likely in the case of racially gerrymandered legislative districts.

If such districts are allowed to stand, they are likely to be permanent. Consideration of incumbency politics aside, in the covered jurisdictions of the South and elsewhere, the retrogression test of Section 5 forbids backsliding – any decrease in the number of secure black legislative seats. Plans approved today become the absolute baselines against which subsequent districting changes are measured through at least 2007, when section 5 is now scheduled to expire. *Johnson*, 864 F. Supp. at 1386 ("[A]ny redistricting plan designed for proportionality, that is upheld by the Court today, will not be easily uprooted in the foreseeable future").

B. Proportional representation is the standard of racial fairness that runs through appellants' briefs. That standard assumes the necessity of protective racial sorting in a severely divided society. America is not such a society.

That in a racially fair political system blacks would hold office in proportion to their numbers in the population is a conviction that runs through all the briefs for appellants. See, e.g., Brief for the United States at 12. Disproportionately low black officeholding denies representation to a group for whom members of no other group can speak. In severely divided societies, whites cannot speak for blacks, or (by logical extension) blacks for whites. Blacks, it is assumed, are a nation within our nation, a people apart. And as such, they are entitled, as a matter of elementary fairness, to representation in proportion to their population strength.

1. The evidence does not support the view that blacks are a people apart, and our public law should not treat them as such.

In 1945, the novelist and social critic Richard Wright described his boyhood days in a South in which "whites had drawn a line over which we dared not step." Wright, *Black Boy* 251 (1945). That line has disappeared, and the position of African Americans within American society has been transformed. More than 80 percent of blacks polled in national surveys report having whites as neighbors. Feigelman and Gorman, "Blacks Who Live Near Whites: 1982 and 1987," 74 *Sociology and Social Research* 32, 202-07 (July 1990). Few whites say that they wouldn't want to live next door to a black family, although 30 percent object to having a Fundamentalist as a neighbor. Schuman, Steen, and Bobo, *Racial Attitudes in America: Trends and Interpretations* 106-07 (1985); see also Bates,

Battleground 64 (1993). African Americans are permanent and influential political players – in both North and South. They are partners in powerful law firms, and doctors at distinguished hospitals. An African American model in an upscale Bloomingdale's clothing ad is now business as usual; as are black actors in television commercials selling every sort of product. The Bill Cosby show, watched by 20 million viewers, earned NBC a billion dollars.

African Americans still have incomes below the national average, are less likely than whites to have a college degree, have higher poverty rates, and rank behind whites in most measures of socioeconomic status. But they are no longer a people apart. They have become part of the American mainstream. As the district court noted in *Johnson v. Miller*, 864 F. Supp. at 1390, "Blacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths."

Until the 1960s almost all of the small numbers of black students attending college were to be found in historically black institutions; today the number in higher education has grown explosively, and six out of seven attend predominantly white institutions. Black separatist political movements go nowhere. This picture obviously could be enlarged, but the point should be clear. The United States is not yet a fully integrated society, but it has moved in that direction with impressive speed in the four decades since *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In 1995, blacks no longer need extraordinarily protective arrangements that consign them to a separate electoral caste.

2. The legal ratification of the notion of two societies – one white and one black – may make it a self-fulfilling prophecy.

African Americans are not a racially-defined nation within our nation. And yet if both blacks and whites believe they are, it may well become true. This is especially the case if that perception informs the law. Separate admissions procedures for whites and blacks, separate hiring processes, separate legislative districts: given a stamp of approval by Congress and this Court, they will paint an official, influential, and perverse portrait of American society.

The drive for proportionate racial and ethnic representation by means of race-based districting is informed by unwarranted pessimism, which if embodied in law threatens to do far more harm than good.

3. Even if blacks remain a separate group within American society, with identifiable political interests firmly tied to their race, the deliberate gerrymandering of majority black districts cannot be justified.

Our form of democracy makes no provisions for the representation of "interest groups," racial or political. Unlike some other democracies where political parties are formed around interests and a party's numbers in the legislative body are determined by the share of the vote it receives, our representational system is not designed to represent group interests. By contrast, in proportional representation systems, groups such as environmentalists or ethnic minorities, for example, may be directly represented in the legislative body by parties organized for that purpose, whose exact numbers in the body are determined their share of the vote.

In the United States, all interest groups must work out their political fortunes within the confines of a representational system based on geographically constructed districts. Thus here, environmentally oriented voters will be represented in the legislative body by the representatives elected from their geographically based districts – representatives for whom the environment will be only one of many items on their legislative agenda. Likewise, Democratic voters living in a Republican controlled district are "represented" by the Republican, even if they voted for someone else.

Gerrymandered race-based districts are an attempt to provide minorities, and only minorities, with direct group representation, free from the constraints our geographically based districting system places on the representation of all other interests. See, e.g., Butler, "Affirmative Racial Gerrymandering." To impute to Congress an intent to permanently remove one group from the pluralism of American politics not only misreads the basic objectives of the Voting Rights Act, but would ensure the very segregation the act was intended to cure.

C. Racial classifications are dangerous to everyone. The harm is to whites and blacks alike.

"All citizens are stigmatized by the notion that their 'interests' can be defined by race or will be represented adequately only if a member of their racial 'group' holds a particular office," the district court concluded. U.S. J.S. App. 11a. It was true as well of the segregated institutions of the Jim Crow South. Blacks and whites were both harmed when drinking fountains carried "white" and "colored" signs.

Racial classifications, in short, deliver the message that skin color matters – profoundly. They suggest that white folks and black folks just are not the same, that race

and ethnicity are the qualities that really matter. Individuals are defined by blood – not by character, social class, religious sentiments, age, or education. But categories appropriate to a caste system are a poor basis on which to build that community of equal citizens upon which democratic government depends. Equal citizens are free to define themselves, and do so differently in different contexts. A voter whose choice of a candidate in a presidential primary is shaped primarily by racial considerations might react to the issues in a school board contest as parents of other races do. It is precisely that fluidity of individual political identity that prevents the formation of castes, which are rigid and hierarchical by nature.

"The destinies of the two races, in this country, are indissolubly linked together," Justice Harlan wisely noted in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).[15] It is obviously the case. And yet race-based districting works to separate the races, sending them their separate political ways.

No decisions this Term are more important than those involving racially-driven districting. If this Court overturns the lower court's judgment in this case, it will have signed on to a badly mistaken notion of American society – one that sees white racial attitudes as little changed since the 1960s; a racial divide that creates two nations, separate and unequal; blacks as politically excluded and thus in need of extraordinary protection from white competition. If embraced by the law, that view will perpetuate and encourage group-based thinking.

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[15] On Harlan's dissent and the history of the color-blind idea, see Kull, *The Color-Blind Constitution* (1992).

Ours is a nation of individual citizens, not a confederation of racial and ethnic groups. We need the Court's help to stay the course.

Respectfully submitted,

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